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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

OSCAR PORCELLI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR PETITIONER

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1. The Government, in its Brief in Opposition ("Opp."), does not defend the reasoning of the majority below, but instead argues a theory of the case expressly rejected by the Court of Appeals. Even the majority below recognized that Porcelli's conviction could not be sustained under *McNally* v. *United States*, 483 U.S. 350 (1987), on the theory that he deprived the State of sales tax revenue, because the prosecution failed to prove that he collected taxes owed New York. *See* Pet. App. 13a ("But did Porcelli *deprive* New York of its property? The answer to this question would be easy if Porcelli actually collected the tax on his sales. * * * However, the Government did not prove actual collection of the tax") (emphasis in original).

The majority below upheld the mail fraud convictions on the novel theory that Porcelli deprived the State of

its intangible "chose in action" to collect the taxes, by failing to disclose that he owed them. Pet. App. 15a-16a. The Government does not defend this reasoning—and in fact does not even mention it—because, as Judge Newman persuasively reasoned in dissent, it is clearly untenable after *McNally*. *See* Pet. App. 29a-33a. Instead, the Government argues that Porcelli deprived the State of sales taxes. *See, e.g.*, Opp. 8 n.2 (describing property interest allegedly taken from the State by Porcelli as the "sales tax due"), *id.* at 9 (asserting that Porcelli "deprived the State of sales tax revenue").[1]

2. As explained in the Petition, this Court has held that an individual who owes taxes "is a debtor and not a bailee;" he is "answerable for a tax" but does not hold the Government's property. *United States* v. *Johnston*, 268 U.S. 220, 226-227 (1925). *See* Pet. 10-11. Since such a debtor does not hold any property of the Government, failure to pay the debt cannot constitute depriving the Government of *its* property, as required under *McNally*.

The Government has no answer to this reasoning. Although the *Johnston* decision and recent Court of Appeals cases applying it were clearly set forth and relied upon in the Petition, Pet. 10-11 & n.6, the Government does not even cite—much less attempt to distinguish—*Johnston* or the other cases. If the Government is right, this Court was wrong in *Johnston*.

3. The Government distinguishes the conflict cases cited in the Petition only by relying on its rejected theory of the case, rather than the theory actually adopted by the majority below. The cases cited by Petitioner stand for the proposition that concealing information from the

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[1] The Government's error is perhaps clearest when it contends that the property interest taken from the State "was sufficiently concrete that [Porcelli] could spend it." Opp. 7. Porcelli could not, of course, "spend" New York's chose in action—the only "property" interest the majority below ruled he took from the State.

Government—information that, if known, may have led the Government to take steps to *obtain* money or other property—does not constitute depriving the Government of *its* property under *McNally*. *See* Pet. 11-16. As Judge Arnold noted recently for the Eighth Circuit, "[w]ithholding valuable information from the City is not the same thing as depriving the City of its property, and only the latter conduct violates the mail fraud statutes." *United States* v. *Slay*, 858 F.2d 1310, 1316 (8th Cir. 1988). This Court made the same point in *McNally* itself, ruling that a mail fraud violation could not be predicated on the defendants' "failure to disclose their financial interest * * * to other persons in the state government whose actions could have been affected by the disclosure." *McNally*, 483 U.S. at 361 n.9.

The ruling below conflicts directly with this authority. Contrary to the Government's misreading, the majority recognized that Porcelli could not be considered to have taken tax money that belonged to New York. It held instead that he temporarily deprived the State of its "chose in action"—its claim to collect tax monies—a claim which "the State did not even know about." Pet. App. 14a, 16a. The Government can reconcile the ruling below with *McNally* and the conflict cases cited by Petitioner only by rewriting the opinion below.[2]

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[2] The Government chides Petitioner for failing to cite certain cases applying the mail and wire fraud statutes to state tax fraud, but each of those cases was decided before *McNally*, and thus did not consider *McNally*'s requirement that the defendant deprive the State of property it holds as opposed to property it might otherwise obtain. *See McNally*, 483 U.S. at 359 n.8 (mail fraud statute limited to protecting "Government's interests as property *holder*") (emphasis added). As Judge Newman noted in dissent, "*McNally* requires us to reconsider the continued validity of that line of cases." Pet. App. 29a (citing the same cases relied on by the Government).

4. The Government's revisionism is also its only response to Judge Newman's point that the majority's theory was never "charged in the indictment, nor presented to the jury." Pet. App. 33a. *See* Pet. 16-18. The Government correctly notes that the indictment charged Porcelli with depriving the State of sales taxes and that the instructions required the jury to find that he defrauded the State of money due from sales taxes. *See* Opp. 7-8 n.2. The problem is that, as noted, this was not the theory on which the majority sustained the conviction. The Government does not dispute that *neither* the indictment *nor* the jury charge made any reference to deprivation of a chose in action, the property interest on which the majority relied. *See* Pet. 17 n.16; Pet. App. 33a (Newman, J., dissenting).

Nor does the Government claim that the jury instructions were correct under *McNally*. That case requires a finding that the victim was deprived of property; gain to the defendant is not sufficient. *See* 483 U.S. at 360; Pet. 11. The jury here was expressly told it could convict Porcelli on the basis of "*either* some loss to a victim *or* a gain to the schemers." Ct. App. JA A-315 (emphasis added). The most that the Government can argue is that, "in context," the jury must have found loss to the State if it found gain to Porcelli. Opp. 8 n.2. But that of course is not at all true, given the majority's theory that the pertinent property interest was the State's "chose in action" and not the sales taxes themselves. The jury was never instructed on "choses in action," nor does any gain to Porcelli from failing to pay taxes necessarily encompass a deprivation of the State's chose in action. Indeed, the State *retained* this chose in action at all times.

5. The Government does not question the broader significance of the divided decision below. In particular, the Government does not dispute Petitioner's statements that the case "is in no sense fact-bound" and that "[i]f

the decision below is permitted to stand, every case of underpaid state taxes in which the state returns are sent through the mail would become not simply a matter of state concern, but a federal criminal mail fraud case." Pet. 18. Such a startling result should not be sanctioned without review by this Court.

6. As explained in the Petition, this case also merits review because it permits the use of a federal RICO prosecution to collect state taxes, contrary to the recent decision of the Sixth Circuit in *Michigan Dept. of Treasury* v. *Fawaz*, 848 F.2d 194, 8 RICO L. Rep. 160 (6th Cir. 1988). The Government's first answer is that the conflict need not be resolved because the Sixth Circuit decision was not intended for publication, *see* Opp. 11, but this Court has rejected the unsettling notion that it need not concern itself with unpublished circuit opinions.[3]

The Government next dismisses the conflict on the ground that *Fawaz* involved a civil action, whereas this case was a criminal one. But that point only emphasizes the extreme departure from ordinary RICO jurisprudence that the Federal Government has undertaken in this case. In *Fawaz*, the State itself brought a *civil* RICO action for conduct that was a *crime* under *state* law. Here, the Federal Government brought a *criminal* RICO action to collect taxes for the *State*, when the failure to collect and pay the taxes was *not* a crime under state law. If such an approach is permitted to stand, state and federal revenue collectors can be expected to resort to RICO's draconian provisions in lieu of state law with regularity. *See Illinois Dept. of Revenue* v. *Phillips*, 771 F.2d 312, 317 (7th Cir. 1985).

Even the majority below recognized that "the prosecution of a state sales tax evader for a RICO violation pushes that law to its outer limits, especially when that tax evasion was not made criminal by the state itself at

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[3] *See C.I.R.* v. *McCoy*, 108 S. Ct. 217, 219 (1987).

the time that the fraudulent returns were filed." Pet. App. 3a. This troubling and understated fact is not even acknowledged by the Government.

As for the conflict among the Circuits, the objective both here and in *Fawaz* was to use RICO to collect state taxes, which the court permitted in this case, *see* App. 99a (judgment directing payment to New York of "all unpaid sales taxes, interest, and penalties" out of forfeiture), but the Sixth Circuit struck down in *Fawaz*. *See* 8 RICO L. Rep. at 161 (declining "to designate the district courts as collection agencies for unpaid state taxes").

7. Application of the mail fraud statute and, in turn, RICO to federalize and criminalize conduct that was not criminal under state law not only violates the intent of Congress with respect to both statutes, but also contravenes the defendant's due process rights—a challenge specifically raised below.[4] State law provided only civil penalties for Porcelli's conduct, yet the court below construed the mail fraud and RICO statutes to permit criminal prosecution under the most severe statute in the federal prosecutor's arsenal.[5] The result was the forfeiture of Porcelli's legitimate business to the federal government, when he was liable only for civil penalties under state law.[6] Yet the Government fails even to address the significance of the fact that what Petitioner did was *not*

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[4] *See* Ct. App. Br. for Appellant, at 22-23.

[5] *See H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 57 U.S.L.W. 4951, 4958 (U.S. June 26, 1989) (lack of clarity and predictability in application of RICO renders statute vulnerable to constitutional challenge) (Scalia, J., concurring in judgment, joined by the Chief Justice and Justices O'Connor and Kennedy).

[6] The Government professes difficulty in understanding the term "legitimate businesses," *see* Opp. 12 n.5, but this Court had no similar difficulty in *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 57 U.S.L.W. at 4954 (referring to a "legitimate business" as one that "is not a business that exists for criminal purposes").

a crime under state law. This omission speaks volumes about the importance of this case and the potential for harm it represents in the area of criminal law.

CONCLUSION

For the foregoing reasons, and those in the Petition, this Court should grant the writ and reverse the decision below.

Respectfully submitted,

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